

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRIAN L. KROTJE, as Trustee, etc.

Defendant and Appellant,

v.

DARRYL J. KROTJE et al.,

Plaintiffs and Respondents.

D051842

(Super. Ct. No. PN27882)

APPEAL from a judgment of the Superior Court of San Diego County, Richard G. Cline, Judge. Affirmed.

The trustee of two irrevocable trusts purchased real property belonging to the trusts. The trustee partially financed the purchase by taking a credit against his own beneficial interest in the trusts. The trustee partially repaid a promissory note to the trusts in the same manner. The trial court found the trustee's actions violated the trustee's duties of impartiality, of loyalty, and to avoid conflicts of interest. Consequently, the trial court imposed surcharges on the trustee and required him to bear all of his own attorney fees for the underlying litigation. The trustee appeals, principally arguing the trial court's

judgment should be reversed because his actions were authorized by one of the trusts.

We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Paul and Hazel Krotje (individually, Paul and Hazel; collectively, the Krotjes) established The Paul Krotje and Hazel M. Krotje Family Trust (the original trust). The Krotjes were cotrustees of the original trust. Their three children Brian L. Krotje (Brian), Douglas J. Krotje (Douglas), and Darryl J. Krotje (Darryl) and their five grandchildren were the trust beneficiaries.

The trust assets consisted primarily of the Krotjes' community property, including a rental property in Costa Mesa, the Krotjes' residence at 3766 El Paso Alto in San Marcos (the 3766 property), and an adjacent property at 3874 El Paso Alto (the 3874 property). The original trust provided that upon the death of either Paul or Hazel, the survivor would, within six months, divide the trust assets into two trusts, trust A and trust B. Trust A could be amended by the survivor. Trust B could not be amended or revoked.

In November 2001 Paul died and trusts A and B came into existence. Approximately two years later, Hazel amended and restated trust A (amended trust A). Although she consulted with legal counsel about dividing the trust assets between the two trusts, she never completed the division.

The terms of amended trust A and trust B differ in several important respects. First, Brian, Douglas, and Darryl are the only beneficiaries of amended trust A. Under trust B, which is effectively the original trust, the Krotjes' grandchildren are also beneficiaries. Second, amended trust A gives the trustee the power to "purchase property

from or sell property to the trust at fair market value." Trust B does not give the trustee this power. Finally, amended trust A contains an exculpatory clause shielding the trustee from liability "to any interested party for acts or omissions of [the] trustee, except those resulting from [the] trustee's willful misconduct or gross negligence. Trust B does not contain such an exculpatory clause.

A few months before Hazel died, Brian became the trustee of both trusts. After Hazel died, Brian decided to administer the two trusts together rather than divide the trust assets between the trusts and administer the trusts separately. Specifically, he planned to divide all of the trust assets into two equal portions and distribute half under the terms of trust A and half under the terms of trust B.

Unfortunately, Brian, Douglas, and Darryl have a rancorous relationship and, within a few months of Hazel's death, litigation commenced with Douglas petitioning under Probate Code<sup>1</sup> section 17200 to remove Brian as trustee, to compel an accounting, and for other related relief. Brian objected to Douglas's petition and filed his own petition for approval of his first accounting, to which Douglas objected.

Brian and Douglas subsequently mediated and settled their dispute. Among its provisions, the resulting settlement agreement permitted Brian to purchase the 3766 property at 5 percent less than its fair market value as determined by a mutually agreed upon appraiser. The settlement agreement did not specify Brian's financing options.

---

<sup>1</sup> Further statutory references are to the Probate Code unless otherwise specified.

Additionally, Darryl and the grandchildren beneficiaries did not participate in the mediation and were not parties to the settlement agreement.

An appraiser selected by Brian and agreed to by Douglas's counsel appraised the 3766 property at \$550,000. Douglas disagreed with the appraisal and requested Brian obtain a second appraisal at the trusts' expense, which Brian declined to do. Brian subsequently purchased the property for \$523,000 (\$550,000 less 5 percent). Brian financed the purchase in part by taking a \$373,000 credit against his beneficial interest in the trust assets.

Similarly, before Brian became trustee, Hazel had loaned Brian and his wife money to purchase and place a manufactured home on the 3874 property, where they now live. Brian and his wife signed a note promising to pay trust A<sup>2</sup> "the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000) with no interest if paid at maturity." The note did not specify a maturity date, but stated, "Interest at the rate of seven per cent per annum shall commence two years from the date of the death of HAZEL M. KROTJE and continue until principal and interest is paid in full." Two years after his mother's death, Brian repaid \$66,666.67 of the loan. He took a credit on the remainder against his beneficial interest in the trust assets.

After Brian served a second accounting on the trust beneficiaries, Douglas petitioned under section 17200 to determine the validity of the accounting and other acts

---

<sup>2</sup> Although it is not clear from the note, it appears from other facts in the record "trust A" refers to amended trust A.

by Brian, including the two credits he took. Darryl concurred in Douglas's petition and separately petitioned to remove Brian as trustee and for other related relief. The petitions raised two issues relevant to this appeal: (1) whether Brian breached any fiduciary duties by purchasing the 3766 property; and (2) whether Brian breached his duties of impartiality, of loyalty, and to avoid conflicts of interest and, consequently, committed constructive fraud by taking credits against his beneficial interest in the trust assets to partially finance the purchase of the 3766 property and to partially repay the \$100,000 promissory note.

Following a bench trial, the trial court issued a statement of decision finding against Brian on these issues. Specifically, the trial court found Hazel had not allocated the 3766 property to either trust and, therefore, both trusts had an interest in the property. Since trust B does not permit self-dealing by the trustee, the trial court found Brian's purchase of the 3766 property breached the duties of loyalty, of impartiality, and to avoid conflict of interests he owed to the beneficiaries of trust B.<sup>3</sup>

In addition, the trial court found the appraisal used by Brian to establish the purchase price of the 3766 property was partially flawed and understated the fair market value of the property by \$50,000. The trial court also found Brian's insistence upon using this disputed appraisal breached the duties of loyalty, of impartiality, and to avoid

---

<sup>3</sup> The trial court did not decide whether the purchase of the 3766 property breached these same duties to the beneficiaries of amended trust A, but the trial court noted amended trust A permits self-dealing.

conflict of interests he owed to the beneficiaries of both trusts because he placed his own interests ahead of theirs.

Moreover, the trial court found the credits Brian took to partially finance the purchase of the 3766 property and to partially repay the promissory note breached these same duties to the beneficiaries because the credits amounted to preferential distributions advantaging Brian to the detriment of the other beneficiaries. The trial court further found these breaches constituted constructive fraud.

To remedy the breaches, the trial court surcharged Brian for the difference between the price Brian paid for the 3766 property and the fair market value of the property. The trial court also surcharged Brian for the credit he took to finance the sale. Both of these surcharges required Brian to pay 6 percent annual interest on the disputed amounts from the date Brian purchased the property until the date of final distribution of the trust assets. In addition, the trial court surcharged Brian for the credit he took to partially repay the \$100,000 promissory note. This surcharge required Brian to pay 7 percent annual interest on the credited amount from the date of Hazel's death until the date of final distribution. Finally, the trial court surcharged Brian for the attorney fees and costs incurred by him as trustee in connection with the underlying litigation.

On appeal, Brian argues the trial court erred in: (1) finding Hazel had not allocated the 3766 property to either trust; (2) failing to analyze the propriety of his actions under amended trust A, rather than trust B; (3) finding his actions constituted constructive fraud; (4) requiring him to bear his own attorney fees; and (5) requiring him to pay interest on the credit he took to partially repay the promissory note from the date

of Hazel's death, rather than from two years after her death. We affirm the trial court's judgment in all respects.

## DISCUSSION

### I

#### *3776 Property Was Not Allocated to Either Trust*

Brian contends the trial court erred in finding Hazel had not allocated the 3766 property to either trust because the schedule of trust assets appended to amended trust A lists the 3766 property as an asset of this trust. Preliminarily, we note this contention is inconsistent with Brian's position below<sup>4</sup> and a party may not change positions and adopt new and different theories on appeal as this is unfair to the trial court and manifestly unjust to the opposing party. (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241; *DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 677; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

Even if this contention were proper, we conclude it lacks merit because it challenges a factual finding that is supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Specifically, Jacqueline

---

<sup>4</sup> One of the issues at trial was whether part of the 3874 property, where Brian resides, was a trust asset because the schedule of trust assets lists a 17 percent interest in the property. Brian argued Hazel had gifted the entire property to him and his wife as evidenced by a quitclaim deed signed by her. He further argued the schedule of trust assets was obviously inaccurate and could not be relied upon because it included some property that was not a trust asset and omitted other property that was a trust asset. The trial court determined Hazel had gifted the property to Brian, implicitly agreeing with him that the schedule of trust assets was inaccurate.

Skay, the attorney who prepared amended trust A and the schedule of trust assets, testified she discussed the division of the trust assets with Hazel and her office drafted documents to accomplish the division, but Hazel never actually completed the division. Accordingly, we conclude the trial court did not err in finding Hazel had not allocated the 3766 property to either trust.

## II

### *Purchase of the 3766 Property Was Improper*

Brian contends the trial court erred in analyzing his purchase of the 3766 property under trust B. Since the trial court found amended trust A has an undivided interest in the 3766 property, he contends the trial court should have analyzed his actions under amended trust A. Had the trial court done so, he contends the trial court would not have found his purchase of the 3766 property breached any duties because amended trust A permits him to self-deal, permits him to sell property without prior approval by anyone, and shields him from liability except for acts of willful misconduct or gross negligence. Stated more simply, Brian contends the provisions of amended trust A should trump the provisions of trust B.

Brian has not cited any legal authority to support this contention and we have not located any. Furthermore, courts must, whenever possible, interpret trust documents to give effect to the settlor's intent. (§§ 21101, 21102; *Ephraim v. Metropolitan Trust Co. of Cal.* (1946) 28 Cal.2d 824, 834.) Brian's contention conflicts with this paramount rule because the original trust clearly expressed the Krotjes' intent for trusts A and B to be discrete trusts and for the surviving spouse to be unable to amend trust B.

The trial court recognized its obligation to interpret the trusts to fulfill the Krotjes' intent by treating trust B as a distinct trust under which Brian had distinct obligations to distinct beneficiaries. As there is no dispute Brian's purchase of the 3766 property was not permitted under trust B, we conclude the trial court did not err in finding Brian's purchase of the 3766 property violated his fiduciary duties to the trust B beneficiaries.

### III

#### *Brian's Actions Constituted Constructive Fraud*

Brian contends the trial court erred in finding his actions constituted constructive fraud because constructive fraud required reliance and injury and there is no evidence the beneficiaries relied on or were injured by his actions or omissions. This contention lacks merit because reliance by the beneficiaries is presumed absent direct evidence to the contrary and Brian has not identified any such evidence. (*Estate of Gump* (1991) 1 Cal.App.4th 582, 601.) Moreover, this contention ignores the trial court's undisputed factual finding that the \$373,000 credit Brian took to purchase the 3766 property deprived the trusts of the opportunity to earn interest income on this amount.

In light of our conclusion in this section and the preceding sections, Brian's related contention that the trial court erred in requiring him to bear his own attorney fees is moot.

### IV

#### *Interest Assessment Was Proper on the Unpaid Balance of the Promissory Note from the Date of Hazel's Death*

Brian contends the trial court erred in ordering him to pay interest on the unpaid balance of the promissory note from the date of Hazel's death because, under the terms of

the promissory note, interest did not begin accruing until two years after her death. This contention misunderstands the breach the trial court's order was remedying. The trial court's order was not remedying a breach of the promissory note. Rather, the trial court's order was remedying Brian's breach of his duties of loyalty, of impartiality, and to avoid conflicts of interest. Although the note did not begin to accrue interest until two years after Hazel's death, the note had no maturity date or other terms preventing Brian from paying the debt sooner. Implicit in the trial court's order are findings that Brian could and should have marshaled the asset upon Hazel's death and, by not doing so and then taking a credit to pay part of it, Brian deprived the trusts of the benefit of the money. Accordingly, we conclude the trial court did not err in requiring Brian to pay interest on the note from the date of Hazel's death.

#### DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

---

McCONNELL, P. J.

WE CONCUR:

---

HALLER, J.

---

O'ROURKE, J.